

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-244

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,

Petitioner,

vs.

MGM GRAND HOTEL, INC., a
Nevada corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE

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No. _____

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,

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vs.

MGM GRAND HOTEL, INC., a
Nevada corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, United Pacific Insurance Company, a Washington corporation ("United"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 31, 1976.

1.

OPINIONS BELOW

The opinion of the Court of Appeals has been officially reported at 533 F.2d 486 and it appears at Appendix A, infra, pp. 1-7. The order of the Court of Appeals denying the petition for rehearing has not been officially reported and it appears at Appendix B, infra, pp. 1-2.

The decision of the District Court is reported at 65 F.R.D. 624 and it appears at Appendix C, infra, pp. 1-53.

JURISDICTION

On December 17, 1974, the United States District Court for the District of Nevada filed its order granting a Motion for Summary Judgment previously filed jointly by Petitioner and Imperial Glass Company ("Imperial")^{1/} and on December 31, 1974, entered judgment dismissing the complaint of Respondent, MGM Grand Hotel, Inc. ("MGM").

^{1/} Imperial filed a petition on February 11, 1976 in the United States District Court for the Central District of California stating that it desired to effect a plan under Chapter 11 of the Bankruptcy Act and is not a party to this petition.

On December 31, 1974, at MGM's request, the District Court amended its December 17, 1974 order to comply with the requisites for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and on February 10, 1975, the Court of Appeals granted MGM leave to appeal.

The judgment of the Court of Appeals reversing the District Court was entered on March 31, 1976, and a timely petition for rehearing was denied by the Court of Appeals on May 21, 1976. This Petition for Certiorari is filed within 90 days after that date.

This action was brought in the District Court by MGM, a Nevada corporation, against Imperial, a co-partnership consisting of persons who are citizens of California, and United, a Washington corporation. Federal jurisdiction was invoked on the basis of diversity of citizenship between the parties, 28 U.S.C. § 1332.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is a party who makes an unsuccessful motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") precluded from disputing at trial the truth of the matters set forth in its opponent's opposition papers?

2. Did the Court of Appeals properly apply Nevada law when it concluded that MGM's failure to obtain a Nevada contractor's license did not bar MGM from prosecuting its claim against Imperial and United?

STATUTE AND RULES INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure and § 624.320 of Nevada Revised Statutes ("NRS"), the pertinent parts of which appear at Appendix D, infra, pp. 1-7.

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STATEMENT OF THE CASE

1. Proceedings Before the District Court

This case arose out of the construction of the MGM Grand Hotel in Las Vegas, Nevada, one of the largest resort hotels in the world, a construction project costing in excess of one hundred million dollars. Imperial contracted with MGM to construct a portion of the building for \$2,325,000. United posted a performance bond on Imperial's behalf.

Approximately half way through the job, MGM, contending that Imperial had not performed its contract properly, purported to terminate the contract and on April 20, 1973, brought suit against Imperial and United in the District Court.

On May 14, 1974, Imperial and United filed their motion for summary judgment contending that MGM could not sue because it was not a licensed contractor citing NRS §624.320 which in substance provides that no person acting in the

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capacity of a contractor^{2/} may maintain an action for the "collection of compensation for the performance of any act or contract for which a license is required" unless such person was licensed. (See Appendix D, infra, pp. 6-7).

Among other things, the motion was supported by portions of the deposition of Fred Benninger, MGM's Chairman of the Board (in which Mr. Benninger testified as to the role he had played in connection with the job) and by the parties' contract.

MGM admitted that it was not licensed but contended that there were issues of fact which precluded the entry of a summary judgment. District Judge Foley, the former Nevada Attorney

^{2/} At the Court of Appeals, MGM contended that a license was not required of it because it was not "in the business of acting as a contractor." However, the Court of Appeals did not decide the issue (Footnote 4, 533 F.2d at 488, Appendix A at p. 3).

General, held that Nevada law required MGM to have a license, absent which MGM's suit could not be maintained, and granted the motion for summary judgment. (65 F.R.D. 624, Appendix C).

2. Decision of the Court of Appeals

In an opinion by Circuit Judge Ely, joined in by Circuit Judge Koelsch and District Judge Jameson, the Court of Appeals reversed Judge Foley's summary judgment, not on the ground that there were unresolved questions of fact which precluded its entry, but rather the court held that as a matter of law (on which the Nevada Supreme Court has not spoken directly) MGM could maintain the suit notwithstanding that it was acting in the capacity of an unlicensed contractor.

A. Summary Judgment Procedure

The decision below appears to have precluded Petitioner from contesting at trial the "facts" set forth in MGM's opposing affidavits. MGM did not move for summary judgment. Thus, Imperial

and United were not obligated to oppose at that time the factual contentions set forth in MGM's affidavits. Yet, the adoption in the decision below of the contentions set forth in those opposing affidavits to support the decision that as a matter of law MGM did not need a license, is the exact opposite of the ordinary summary judgment situation, the practical result of which is that MGM won a partial summary judgment although it not only never made such a motion but on the contrary contended throughout that there were genuine issues of fact which precluded the granting of such a motion.

Specifically, the Court of Appeals' opinion (533 F.2d at 488, Appendix A at p. 3) states (without identifying them) that there were genuine unresolved issues of material fact. However, it then concluded that notwithstanding unresolved issues of fact, as a matter of law MGM did not need a license.

"MGM concedes that it is not a licensed contractor; however, it contends that the statute has been satisfied by the undisputed fact that Taylor is a

licensed contractor. We agree." (Opinion, 533 F.2d at 488, Appendix A at p. 3).

"We conclude that Imperial is not, as a matter of law, entitled to prevail." (533 F.2d at 488, Appendix A at p. 3).

It is clear that the decision below rests on MGM's version of the facts as set forth in the opposing affidavits:

"Similarly, the arrangement between MGM and Taylor substantially complied with the Nevada licensing scheme. To the extent that licensing protects the public against faulty construction, the public was adequately protected by the fact that Taylor, who had total responsibility for supervising construction of the hotel, was a licensed contractor . . . Looking to the realities of MGM's financial status, there is absolutely no suggestion in the record that MGM is financially irresponsible. Indeed, it was to exploit the strong financial position of MGM's parent corporation that the managing contractor arrangement was adopted by

by MGM. Moreover, because MGM is operating hand in hand with a licensed contractor, the Nevada Contractor's Board is in a position to monitor the progress of construction should there arise any doubt about the financial stability of the project. Thus, a policy of protecting the public would in no way be furthered by imposing upon MGM such a harsh penalty as barring it from bringing its suit." (533 F.2d at 489-90, Appendix A, at pp. 5-6).

Thus, it would appear from the decision below that by virtue of having made a motion for summary judgment, Imperial and United are now precluded from litigating at trial the facts on which the decision below presumably rests, namely (1) whether Taylor, a licensed contractor, had total responsibility for supervising construction and (2) whether MGM was financially irresponsible.

This result, which Petitioner called to the attention of the Court of Appeals in the petition for rehearing, serves to penalize the maker of a motion for

summary judgment and is without precedential support.

B. Application of State Law

Admittedly, the Court of Appeals was dealing with a question never directly answered by the Nevada Supreme Court. However, the decision below is directly contrary to all available indicia of what the Nevada Supreme Court would have done in this situation.

First, New Mexico and California have statutes which bar suits by unlicensed contractors. Those statutes, § 7031 of the California Business and Professions Code (West, 1975), and § 67-35-33 of New Mexico Statutes Annot., appear at Appendix E. The terms of those statutes are virtually identical to NRS § 624.320.

As the decision below recognized (533 F.2d at 490, Appendix A at p. 6, Footnote 11 and text accompanying), the appellate courts of those states have held a suit to be barred under these same circumstances.

Second, Nevada Supreme Court cases dealing with NRS § 624.320 have relied

almost totally on California precedent.

In Magill v. Lewis, 74 Nev. 381, 333 P.2d 717 (1959), cited in the decision below (Footnote 6, 533 F.2d at 489, Appendix A, at p.4), which appears at Appendix F. pp. 1-18, the Nevada Supreme Court held that a suit by an unlicensed contractor on the contract was barred by NRS §624.320 but that one based on fraud was not. The precedent cited was six California intermediate appellate cases (333 P.2d at 719-20, Appendix F at pp. 11-12).

In Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 440 P.2d 122 (1968), primarily relied upon in the decision below (Footnotes 6 and 7, 533 F.2d at 489-90, Appendix A at p. 4), which appears at Appendix F, pp. 18-26, the Nevada Supreme Court relied on Latipac, Inc. v. Superior Court, 64 Cal. 2d 278, 49 Cal.Rptr. 676, 411 P.2d 564 (1966), a California Supreme Court case, and on Magill v. Lewis, supra (440 P.2d at 123, Appendix F at pp. 24-25).

Third, see In re Platz, 60 Nev, 296, 304, 108 P.2d 858, 862 (1940) where the

Nevada Supreme Court held that the interpretation of the provisions of a statute by the appellate courts of a sister state will be given great weight by Nevada courts in construction of similar Nevada statutes.

The refusal of the Court of Appeals to apply California and New Mexico precedent constitutes an unexplained and unsupported departure from the long standing practice of the Nevada Supreme Court. The reference in the decision below (Footnote 12, 533 F.2d at 490, Appendix A at p. 6 to a statement in Milum v. Herz Bros. Water Well Drilling & Supply Co., 74 Nev. 309, 312, 329 P.2d 1068, 1069 (1958), that failure to obtain a contractor's license will not prevent the unlicensed person from defending a lawsuit, does not suggest that the Nevada Supreme Court would fail to follow California precedent because Milum is in accord with California law. See e.g., Dahl-Beck Elect. Co. v. Rogge, 275 Cal. App.2d 893, 903, 80 Cal.Rptr. 440 (1969) and cases cited therein.

Finally, instead of following the

trend established by the Nevada Supreme Court in the cases cited above, the decision below appears to rely on a Nevada trial court's criticism of the District Court's decision in this case after it was made (Footnotes 5 and 9, 533 F.2d at 489-90, Appendix A at pp. 4-5). However, that trial court decision is not controlling precedent in Nevada and should not have been considered. King v. United Commercial Travelers, 333 U.S. 153, 161, 92 L.Ed. 608, 613 (1947).

The Nevada trial court rendered its decision in denying a motion for summary judgment. A decision denying a motion for summary judgment is not a final judgment and may be reexamined at trial. Nev. Rules Civ. P., Rule 54(b); Ormachea v. Ormachea, 67 Nev. 273, 288-90, 217 P.2d 355, 363-64 (1950).

The Nevada trial court was a court of original jurisdiction. Nevada Const., Art. 6, § 6; NRS § 3.190. Only Nevada Supreme Court decisions are precedent. Cf Nevada Sup. Ct. Rule 244. Trial court opinions, as distinguished from findings, conclusions, and judgments,

are given no weight by the Nevada Supreme Court. Ormachea v. Ormachea, supra, 67 Nev. at 295, 217 P.2d at 366; Hunter v. Sutton, 45 Nev. 430, 205 Pac. 785 (1922).

The Nevada trial court's ruling is inconsistent with Magill v. Lewis, supra, 74 Nev. 381, 333 P.2d 717, wherein the Nevada Supreme Court refused to apply a "public policy" exception to the contractors licensing statute similar to that seemingly adopted by the trial judge.

Why the Court of Appeals found the trial court decision persuasive whereas it has refused to give such weight to California trial court decisions (Curry v. Fred Olsen Line, 367 F.2d 921, 924, n 10 [9th Cir. 1966]) is unclear. We suggest that the decision of District Judge Foley, the former Nevada Attorney General, is more weighty authority than the interlocutory decision of the state trial judge.

REASONS FOR GRANTING THE WRIT

There are two principal reasons for granting the writ in this case.

First, the decision below has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. As set forth supra, pp. 7-11, the decision below appears to have bound Petitioner to the "facts" asserted by MGM in its papers filed in opposition to the motion for summary judgment, thus precluding litigation of the license issue at trial. Such an effect imposes a harsh sanction indeed on the maker of a motion for summary judgment unlike anything mandated by FRCP Rule 56.

Construction of the Federal Rules of Civil Procedure is a well established basis for the exercise of certiorari jurisdiction. See National Hockey League v. Metropolitan Hockey Club,

_____, U.S. ____, _____, L.Ed.2d ____ (1976) (No. 75-1558); Schlagenhauf v. Holder, 379 U.S. 104, 13 L.Ed.2d 152 (1964).

As set forth supra, the decision of

the District Court has been officially reported at 65 F.R.D. 624 and catalogued under appropriate references to Rule 56. Thus, the Court of Appeals' reversal may cause a serious setback to the viability of summary judgment proceedings.

Second, as set forth supra, pp. 11-15, the decision below is in conflict with decisions rendered by the Supreme Court of Nevada.

This case is a diversity case involving the interpretation of Nevada law regulating the licensing of construction and building contractors. The Nevada statutes involved are so similar to the building contractors licensing statutes of three western states in the Ninth Circuit, Arizona, California, and Nevada, and two states in the Tenth Circuit, New Mexico and Utah, that the impact of the decision below in all five states is likely to be immediate and drastic.

The statutes of all five states (Ariz. Rev. Stats. § 32-11-51, Cal. Bus. and Prof. Code § 7028 (West 1975), NRS § 624.230, New Mex. Stats. Annot. § 67-35-15, Utah Stats. Annot. § 58-23-1) require that

persons acting in the capacity of building contractors be licensed. It is a common theme of these state statutes that an unlicensed person who enters into a construction contract cannot bring suit on the contract (Ariz. Rev. Stats. § 32-11-53, Cal. Bus. and Prof. Code § 7031, (West 1975) New Mex. Stats. Annot. § 67-35-33, Eklund v. Elwell, 106 Utah 521, 211 P.2d 849 [1949]).

The decision below, "on public policy grounds," carved out an exception to the usual requirement that a contractor be licensed holding that where an unlicensed person who acts in the capacity of a contractor can demonstrate the "builder competence" and "financial responsibility" which the licensing statute contemplated, he can avoid the penalties ordinarily applicable to unlicensed contractors. This holding is contrary to the holding of virtually every state court which has ruled on this issue and serves to emasculate the contractor licensing laws of the five states involved. Because in diversity cases, the federal courts of each circuit must follow the law of the circuit,

this decision creates inherent conflict between the law which will be applied in federal courts and the law which has heretofore been applied in state courts dealing with similar issues. This result is certain to encourage forum shopping in cases involving construction disputes where multi state parties are involved.

The decision below held that to require both MGM and Taylor, its managing contractor, to be licensed would not further the purpose of the statute because of MGM's financial responsibility and Taylor's presence on the job. (533 F.2d at 489, Appendix A at p. 5-6). (It also held that the Nevada Supreme Court would not follow California and New Mexico precedent).

This reasoning, however, has been almost universally rejected.

In Magill v. Lewis, supra, 74 Nev. 381, 333 P.2d 717, the plaintiff's contract count was dismissed on the pleadings notwithstanding that plaintiff held a valid California contractor's license. The court did not concern itself with

whether public policy had been satisfied by plaintiff's demonstrated competence as a builder in that he had been issued a California license.

In Pickens v. American Mortgage Exchange, 269 Cal.App.2d 299, 74 Cal.Rptr. 788 (1969), plaintiff, who held only a painter's license, performed general contractor's work. The court said:

"Further, plaintiff's allegation that any work required to be done by a licensed general contractor was done under the supervision of such a contractor will not avoid the effect of the statute." (269 Cal.App. 2d at 302.)

In Eklund v. Elwell, supra, 106 Utah 521, 211 P.2d 849 the court said:

"Plaintiff contends that Empey as his agent had a license, but, under plaintiff's theory, Empey was not the responsible party, the contractor; and such fact, if true, would not relieve the contractor from the requirements of the statute." (211 P.2d at 850.)

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The decision below cited Nevada Equities, Inc. v. Willard Pease Drilling Co., supra (Appendix F, pp. 18-26), and Magill v. Lewis, supra (Appendix F, pp. 1-18), in support of its finding that the statute had been "substantially complied with." However, both cases looked to California precedent as support for their holdings. Also, the Nevada Equities case dealt with the water well drillers licensing statute, not the contractors licensing statute. As the Nevada court there pointed out in support of its decision allowing the unlicensed well driller to maintain the suit, the well driller statute does not expressly bar suits by unlicensed contractors, whereas NRS § 624.320 of the contractors statute does expressly bar such suits:

"Initially, we note that the bar to the maintenance of an action for compensation (NRS 624.320) precludes contractors who are not licensed under that chapter. The claimant was licensed under that chapter. A comparable provision does not appear in Chapter 534 relating to water well

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drillers. The penalty therein provided is fine, imprisonment, or both. NRS § 534.190. When the statute provides for sanctions other than forfeiture of the right to sue on the contract, an unlicensed person is not precluded from maintaining an action to recover on the contract." (Emphasis added.) (440 P.2d at 123, Appendix F at pp. 23-24).

The "substantial compliance" doctrine recognized by the Nevada Supreme Court in Nevada Equities, supra, is from Lati-pac, Inc. v. Superior Court, supra, 64 Cal.2d 278, 49 Cal.Rptr. 676, 411 P.2d 564. In California, the doctrine is limited to a circumstance under which an unlicensed contractor can show that (1) he held a valid license at the time of contracting (which subsequently lapsed), (2) he promptly renewed his license, and (3) he can demonstrate that a responsible managing employee was in charge of the job throughout. Frank v. Kozlovsky, 13 Cal.App.3d 120, 91 Cal.Rptr. 297 (1970). The doctrine does not apply to a party, such as MGM here, who refused to get a license although requested by

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the Nevada State Contractors Board to do so. Since the doctrine was adopted from California, there is no reason to believe that the Nevada Supreme Court would refuse to continue to follow California interpretation thereof.

Furthermore, California law, as distinguished from Nevada and Arizona law, contains a specific exemption from the licensing requirements for an owner who contracts for his project with a general contractor. Nevada and Arizona law have no such exception.

In Miller v. Superior Court, 8 Ariz. App. 420, 466 P.2d 699 (1968) and Brum-mel v. Whelpley, 46 Mich.App. 93, 207 N.W.2d 399 (1973), owners contended that they should not be required to be licensed because they had in fact contracted for their projects with licensed general contractors.

In both cases these contentions were rejected. And, in Miller v. Superior Court, the court pointed to the difference between the Arizona and California law to support its holding that an Arizona owner was not exempt from the

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requirement that he obtain a license even in the situation where he contracted with a licensed general contractor for the construction of the work.

The Nevada statutory scheme specifically exempts certain owner builders (single family residences and agricultural buildings) from the requirement of a license (NRS § 624.330). Thus, it is clear that the legislature intended that other owners be licensed.

Subsequent to the District Court's decision in this case, the Nevada Legislature changed the law (Footnote 8, 533 F.2d at 489, Appendix A at p. 5). (Chapter 623, Statutes of Nevada 1975, amending NRS § 624.330[9]) to exempt from the licensing requirement an owner who contracted solely with a licensed managing contractor.) It was undisputed below that MGM contracted with over 100 contractors, thus MGM could not have been exempt. Also, in Nevada the legislature is presumed to change the law when it amends it. Utter v. Casey, 81 Nev. 268, 401 P.2d 684 (1965).

It is appropriate to review by

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certiorari a Court of Appeals' reversal of a summary judgment where there is some clear cut important issue of law fundamental to the further conduct of the case. See, e.g. Ernst & Ernst v. Hochfelder, ____ U.S. ____ , 47 L.Ed. 2d 688 (1976).

CONCLUSION

For the reasons stated herein, this Court is respectfully urged to grant this Petition for Writ of Certiorari.

Respectfully submitted,
ROBERT M. SHAFTON
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TYRE & KAMINS
PETER M. APPLETON
of Counsel

25.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MGM GRAND HOTEL, Inc., Nevada corporation,
Plaintiff-Appellant,
vs.

IMPERIAL GLASS Co., a co-partnership consisting of GORDON ROSS and I. M. ZERMAN, co-partners; and UNITED PACIFIC INSURANCE COMPANY, a Washington corporation,
Defendants-Appellees.

GORDON ROSS and I. M. ZERMAN, co-partners doing business as IMPERIAL GLASS COMPANY, a co-partnership,

Third-Party Plaintiffs,
vs.

TAYLOR CONSTRUCTION COMPANY, a Nevada corporation; MORRIS M. MASON and STUART J. MASON,

Third-Party Defendants.

No. 75-1274

OPINION

[March 31, 1976]

Appeal from the United States District Court for the District of Nevada

Before: KOELSCH and ELY, Circuit Judges,
and JAMESON, District Judge.*

ELY, Circuit Judge:

This is a diversity action brought by MGM Grand Hotel, Incorporated (MGM), a Nevada corporation, for breach of con-

*Honorable William J. Jameson, Senior United States District Judge, Billings, Montana, sitting by designation.

APPENDIX

tract against Imperial Glass Company (Imperial) a co-partnership consisting of persons who are citizens of California, and Imperial's surety, United Pacific Insurance Company (United), a Washington corporation.

MGM appeals from an order granting summary judgment in favor of Imperial and United. *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 65 F.R.D. 624 (D. Nev. 1974). We reverse.

MGM entered into an agreement with Taylor Construction Company (Taylor), third-party defendant below, by which Taylor agreed to become MGM's "managing contractor" with responsibility for overseeing construction of the MGM Grand Hotel in Las Vegas, Nevada. Because of the massive costs of the project,¹ Taylor was unable to undertake the financial responsibility normally assumed by general contractors. Therefore, the traditional functions of a general contractor were split. Taylor assumed responsibility for supervision of construction,² while MGM assumed all financial responsibility for the project.

On June 19, 1972, MGM and Taylor entered into a contract with Imperial by which Imperial was to furnish and install curtainwall for the hotel at a contract price of \$2,920,000. On April 20, 1973, MGM filed a complaint against Imperial in the District Court, alleging a failure to render substantial perform-

¹The estimated cost of constructing the hotel was \$100,000,000.

²Appellee disputes the level of supervision exercised by MGM; however, in reviewing a summary judgment, we are obliged to view the evidence in the light most favorable to MGM as the non-moving party. *See Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543 (9th Cir. 1975).

Applying this standard, the record reveals that Taylor was wholly responsible for day-to-day supervision of construction. In addition, Taylor selected the subcontractors with whom it wished to deal, prepared bid specifications, and conducted contract negotiations with prospective subcontractors. It was Taylor that supervised, scheduled, and coordinated all work on the job, and it was Taylor that issued purchase orders for the job, resolved problems that arose on the jobsight, and approved all work and materials provided in the construction of the hotel. MGM's involvement, on the other hand, was limited to the activities of its Chairman of the Board, who performed the duties normally attributed to an owner, plus the operation of a one-man office to disburse money in accordance with MGM's obligation to assume financial responsibility for the project.

ance on the contract. Imperial filed a Motion for Summary Judgment, alleging that MGM was not entitled to bring the action because it was not a "duly licensed contractor" within the terms of Nevada Revised Statutes § 624.320.³ The statute provides:

"No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of⁴ acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid."

MGM concedes that it is not a licensed contractor; however, it contends that the statute has been satisfied by the undisputed fact that Taylor is a licensed contractor. We agree.

In reviewing an order granting a motion for summary judgment there are two necessary inquiries: "First, is there any genuine issue as to any material fact? Second, if there is no genuine issue of fact, then, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, is the movant entitled to prevail as a matter of law." *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543 (9th Cir. 1975). Although the record indicates to us that there were genuine unresolved issues of material fact, we need not now make that decision. We conclude that Imperial is not, as a matter of law, entitled to prevail.

In reaching that conclusion, we resolve only the issue as to whether, viewing the evidence in a light most favorable to the

³In the court below a choice of law issue was raised. The District Court held that Nevada law should be applied, and the appellant does not here challenge that ruling.

⁴Appellees dispute the presence of the word "of" in NRS § 624.320, asserting that it is a clerical error inadvertently substituted for the proper word, "or". Since we conclude that the outcome would be the same in the present context regardless of which word is used, we need not now decide which word was intended by the Nevada Legislature.

MGM Grand Hotel, Inc. vs.

non-moving party, MGM is barred by NRS § 624.320 from bringing suit for breach of contract solely because it is not a licensed contractor. The Nevada Supreme Court has never confronted the problem.⁵ Indeed, we are aware of only a handful of cases construing any aspect of NRS § 624.320.⁶ Thus, we attempt to determine from all available data the manner in which the Nevada Supreme Court would interpret NRS § 624.320 if confronted with the precise issue here presented. *See C. Wright, Handbook of the Law of Federal Courts* § 58 at 239-40 (2d ed. 1970). *Cf. Yost v. Morrow*, 262 F.2d 826, 828 n.3 (9th Cir. 1959).

Our conclusion that MGM is not barred by NRS § 624.320 from instituting its suit is based upon two independent reasons. First, it would not further the purposes of the statute to require both the "owner" and the "managing contractor" in an arrangement such as that between MGM and Taylor to obtain contractor's licenses. The primary purpose of Nevada's licensing statutes is to protect the public against both faulty construction and financial irresponsibility.⁷ In determining whether this pur-

⁵Since the District Court's decision in the present case a Nevada trial court has had occasion to examine the same issue. *Las Vegas International Hotel, Inc. v. Argonaut Ins. Co.*, No. A 93354 (8th Jud. Dist. Ct. Nev., May 28, 1975). The court held that NRS § 624.320 was not applicable to managing contractor arrangements, criticizing the District Court that entered summary judgment in the present case for ruling to the contrary. *See note 9 infra.*

While we are not bound by the Nevada trial court's unpublished opinion (*see King v. Order of Commercial Travelers of America*, 333 U.S. 153 (1948)), we do regard it as persuasive authority in support of the conclusions we reach herein.

⁶*See Walker Bank & Trust Co. v. Smith*, 88 Nev. 502, 501 P.2d 639 (1972); *Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (1968); *Briggs v. Zamalloa*, 83 Nev. 400, 432 P.2d 672 (1967); *Magill v. Lewis*, 74 Nev. 381, 333 P.2d 717 (1958); *Milum v. Herz Bros. Water Well Drilling & Supply Co.*, 74 Nev. 309, 329 P.2d 1068 (1958); *Waite v. Burgess*, 69 Nev. 312, 250 P.2d 919 (1952).

⁷See NRS § 624.260(1), which sets the standards for licenses.

"The board shall require an applicant to show such a degree of experience, financial responsibility and such general knowledge of the building, safety, health and lien laws of the State of Nevada and the rudimentary principles of the contracting business as the board shall deem necessary for the safety and protection of the public."

See also Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 303, 440 P.2d 122, 123 (1968).

pose would be implemented by barring MGM from bringing suit against Imperial we are aided, to some extent, by the decision of the Nevada Supreme Court in *Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (1968).

In *Nevada Equities* the court declined to bar a contractor under NRS § 624.320 from bringing suit to recover compensation for services rendered because there was no ascertainable public policy for doing so. Although the contractor had failed to comply with one of the technical licensing requirements of the State Contractor's Board, the court held that the contractor had "substantially complied" with Nevada's licensing scheme, reasoning that there was no suggestion that the contractor was wanting or lacking "in any particular detrimental to the safety and protection of the public." 84 Nev. at 303, 440 P.2d at 123 (1968). Thus, in order to avoid the harsh result apparently indicated by NRS § 624.320, the Nevada Supreme Court looked to the realities of the contractor's financial status and engineering competence to determine whether the public was adequately protected.

Similarly, the arrangement between MGM and Taylor substantially complied with the Nevada licensing scheme.⁸ To the extent that licensing protects the public against faulty construction, the public was adequately protected by the fact that Taylor, who had total responsibility for supervising construction of the hotel, was a licensed contractor.⁹ The issue, then, is whether financial control alone is enough to bar MGM from bringing suit solely because it is not a licensed contractor. Looking to the

⁸During oral argument, we were told that the Nevada Legislature had very recently amended chapter 624 so as to exempt managing contractor arrangements from the purview of the licensing statutes.

⁹A Nevada trial court of general jurisdiction, in criticizing the District Court's ruling in the present case, suggested that to bar MGM from bringing suit would operate to deprive the public of some of the protection the licensing statutes, NRS ch. 624 were designed to afford.

"That the statutory scheme of NRS Chapter 624 was designed to protect the public goes without question, but the prohibition laid down in *MGM* can hardly be said to be in the interest of the public. *MGM* sanctions the anomalous situation of relegating an owner to a position where it cannot protect the public from the shoddy workmanship of its subcontractors if it cannot enforce the latter's bond which has been given to secure such a lack of solicitude."

Las Vegas International Hotel, Inc. v. Argonaut Ins. Co., No. A 93354 (8th Jud. Dist. Ct. Nev., May 28, 1975).

realities of MGM's financial status, there is absolutely no suggestion in the record that MGM is financially irresponsible.¹⁰ Indeed, it was to exploit the strong financial position of MGM's parent corporation that the managing contractor arrangement was adopted by MGM. Moreover, because MGM is operating hand in hand with a licensed contractor, the Nevada Contractors' Board is in a position to monitor the progress of construction should there arise any doubt about the financial stability of the project. Thus, a policy of protecting the public would in no way be furthered by imposing upon MGM such a harsh penalty as barring it from bringing its suit.

Our second reason for holding that MGM is not barred by NRS § 624.320 is that the statute, by its terms, only applies to suits "for the collection of compensation for the performance of any act or contract." Hence, the present action cannot be barred because MGM seeks damages for failure of performance rather than compensation for services rendered.

Although we are aware that some other states have construed similar statutes to bar damage actions for breach of contract,¹¹ the Nevada Supreme Court has never decided the issue, and we are unwilling to assume that it would adopt a position so obviously contrary to the explicit, literal language of the statute.¹²

NRS § 624.320 works a forfeiture, a drastic penalty, and the Nevada Supreme Court has unequivocally remarked that it will

¹⁰MGM established a trust fund of \$50,000,000 to finance construction of the hotel. This amount is far in excess of the \$20,000 surety bond that may be required by the State Contractors' Board as a prerequisite to obtaining a contractor's license. See NRS § 624.270(4).

¹¹See, e.g., *General Ins. Co. of America v. St. Paul Fire and Marine Ins. Co.*, 38 Cal. App. 3d 762, 113 Cal. Rptr. 613 (1974); *Proffitt & Durnell Plumbing, Inc. v. David H. Beer Co.*, 247 Cal. App. 2d 518, 55 Cal. Rptr. 764 (1966); *Fleming v. Phelps-Dodge Corp.*, 83 N.M. 715, 496 P.2d 1111 (1972).

¹²See *Las Vegas International Hotel, Inc. v. Argonaut Ins. Co.*, No. A 93354 (8th Jud. Dist. Ct. Nev., May 28, 1975). Cf. *Milum v. Herz Bros. Water Well Drilling & Supply Co.*, 74 Nev. 309, 312, 329 P.2d 1068, 1069 (1958) (rejecting the theory that an unlicensed contractor was barred by NRS § 624.320 from defending an action because "(s)uch construction would do violence to the plain meaning of the act."), cited with approval in *Walker Bank & Trust Co. v. Smith*, 88 Nev. 502, 501 P.2d 639 (1972).

not condone such a forfeiture in the absence of some sound public policy requiring that it should do so. *Nevada Equities, supra*, 84 Nev. at 303, 440 P.2d at 123. To uphold the forfeiture applied against MGM would necessitate our construing the statute more broadly than its language fairly permits. We decline to do this, especially since we can see no overriding public policy compelling us to do so. Thus, even if we were to find that MGM is a "contractor" within the meaning of NRS § 624.320, we would not hold that the statute prohibited MGM's institution of the suit.

REVERSED AND REMANDED.

APPENDIX

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MGM GRAND HOTEL, INC.,) FILED
a Nevada corporation,)
Plaintiff-Appellant,) May 21 1976
vs.)
IMPERIAL GLASS CO., a co-) No. 75-1274
partnership consisting of)
GORDON ROSS and I. M. ZEMAN,)
co-partners; and UNITED)
PACIFIC INSURANCE COMPANY, a)
Washington corporation,)
Defendants-Appellees.)

GORDON ROSS and I. M. ZEMAN,)
co-partners doing business as)
IMPERIAL GLASS COMPANY, a co-)
partnership,)
Third-Party Plaintiffs,)
vs.)
TAYLOR CONSTRUCTION COMPANY,)
a Nevada corporation; MORRIS)
M. MASON and STUART J. MASON,)
Third-Party Defendants.)

Before: KOELSCH and ELY, Circuit Judges,
and JAMESON, District Judge.*

All three judges initially concerned with the subject case (Koelsch, Ely, and Jameson) have voted to deny the Petition for Rehearing. Judges Koelsch and Ely have noted that the suggestion for en banc rehearing be rejected, and Judge Jameson has recommended that such suggestion be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

*Honorable William J. Jameson, Senior United States District Judge, Billings, Montana, sitting by designation.

APPENDIX

APPENDIX C

MGM GRAND HOTEL, INC., a Nevada Corpora-
tion, Plaintiff,

v.

IMPERIAL GLASS CO., a co-partnership con-
sisting of Gordon Ross and I. M. Zerman,
co-partners, and United Pacific Insurance
Company, a Washington Corporation,
Defendants.

Civ. No. LV-2032 RDF.

United States District Court,
D. Nevada.
Dec. 17, 1974.

Hotel owner brought action against sub-
contractor and its surety to recover for
costs of completing the work after subcon-
tractor had been taken off the job for al-
legedly shoddy workmanship. On contrac-
tor's and surety's motion for summary judg-
ment, the District Court, Roger D. Foley,
Chief Judge, held that determination of
whether owner had acted as a contractor
and, if so, was required to have a con-
tractor's license in order to bring the

action would be made under Nevada law even though contract specified that rights and liabilities of the parties were to be determined under California law, where application of California law would circumvent fundamental policies of Nevada law and where Nevada was the state whose law would have applied in the absence of the contractual provisions; that hotel owner did act as a contractor; that hotel owner was required to obtain Nevada contractor's license; and that failure of the owner to obtain the contractor's license precluded it from bringing the action.

Summary judgment granted.

Wiener, Goldwater & Galatz, Las Vegas, Nev., for plaintiff.

Tyre & Kamins, Peter M. Appleton, Los Angeles, Cal., Rogers, Monsey, Lea, Woodbury & Sheehan, Las Vegas, Nev., for defendants.

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ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ROGER D. FOLEY, Chief Judge.

FACTS

Plaintiff initiated the instant suit on April 20, 1973. As a jurisdictional base plaintiff relies on diversity of citizenship in that it is a Nevada corporation, defendant Imperial Glass Company is a California corporation, and defendant United Pacific Insurance Company is a Washington corporation. Since all defendants were transacting business within the State of Nevada, in personam jurisdiction over them was obtained through the use of NRS § 14.065. (The Nevada "long-arm" statute.) Plaintiff has alleged damages in excess of \$10,000.

Plaintiff's alleged cause of action against defendants arose in the following fashion. On June 19, 1972, plaintiff and

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defendant Imperial Glass Company (hereinafter Imperial) entered into a contract whereby Imperial was to act as a subcontractor and perform certain services in conjunction with the construction of plaintiff's hotel and casino facility in Las Vegas, Nevada. According to the terms of this agreement, Imperial was to furnish to plaintiff an acceptable surety bond to insure the performance of Imperial's contractual duties. Imperial procured this surety bond from defendant United Pacific Insurance Company (hereinafter United Pacific) and furnished it to plaintiff. On April 16, 1973, after Imperial had performed a substantial amount of work on the project, plaintiff terminated the aforementioned contract alleging that Imperial had performed its work in a shoddy manner and had failed to comply with the applic-

able construction completion schedule.

Plaintiff further alleged that as a result of this breach it was forced to hire another sub-contractor to finish the remainder of Imperial's work at a cost in excess of \$10,000. Plaintiff's allegation directed towards defendant United Pacific is that it failed to reimburse plaintiff for the damage caused by Imperial's breach or correct the construction defects caused by the breach.

On June 18, 1973, defendants filed their answer to plaintiff's complaint, specifically denying the majority of plaintiff's allegations and setting forth certain affirmative defenses. In addition, defendants Gordon Ross and I. M. Zeman, co-partners, dba Imperial Glass Company, filed a counter-claim against plaintiff and a third-party complaint against third-party

defendants Taylor Construction Company (hereinafter referred to as Taylor), Morris M. Mason, and Stuart J. Mason. In their counter-claim defendants allege that they have suffered damages in excess of \$22,000,000.00.

On May 14, 1974, defendants and third-party plaintiffs filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure praying that MGM's complaint be dismissed. This motion for summary judgment was based on the ground that,

". . . Plaintiff cannot maintain this action because of Plaintiff's failure and inability to allege and prove that it was a duly licensed contractor under the laws of the State of Nevada during all times when it was acting in the capacity of a contractor within the State

of Nevada, in connection with its performance of the contract on which Plaintiff's complaint is based." Defendant's motion for summary judgment p. 2.

After the receipt of all appropriate responsive and reply memorandums of points and authorities the motion for summary judgment was set for oral argument on November 7, 1974. Having heard oral argument on the issue, and no cross motion for summary judgment having been filed by plaintiff, by order of this Court dated November 7, 1974, defendants and third-party plaintiffs' motion for summary judgment stand submitted.

ISSUE

Should the motion for summary judgment be granted?

DISCUSSION

[1] (I) IS THERE A GENUINE ISSUE OF MATERIAL FACT PRESENTED BY THE INSTANT CASE? The procedure involved in granting a motion for summary judgment allows the cause to be removed from the trier of fact and decided by the court as a matter of law if there are no genuine issues of material fact presented by the case. Rule 56 of the Federal Rules of Civil Procedure, ". . . permits a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, answers to interrogatories, and admissions on file show that there are no genuine issues of material fact to be tried." 6 Moore's Federal Practice ¶ 56.04[1], p. 2058.

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The motion for summary judgment may rest entirely on the pleadings, or it may be supported by affidavits. Once the movant has made and supported his motion in this fashion a duty devolves on the opposing party to affirmatively show that there are genuine issues of material fact to be tried in the case. As the Ninth Circuit has noted:

"When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegations or denials of his pleading. As stated in Rule 56(e), his response by affidavits or otherwise must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if otherwise appropriate, shall be entered against him. (Citations omitted.)

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One against whom a motion for summary judgment is filed is therefore under a duty to show that he can produce evidence at the trial, and is not entitled to a denial of that motion upon the unsubstantiated hope that he can produce such evidence at the trial." Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 (9th Cir. 1969).

If affidavits are filed either in support of or opposition to the motion for summary judgment, these affidavits,

". . . must be made on the personal knowledge of the affiant, set forth facts that would be admissible in evidence, and show affirmatively that affiant is competent to testify to the matters stated therein." See 6 Moore's Federal Practice ¶ 56.22[1], p. 2803, and Rule 56(e) F.R.C.P.

In addition to memoranda of points and authorities, both parties to the instant case have filed affidavits. Upon examination it appears that these affidavits meet the aforementioned test.

[2] The instant case presents this Court with two key issues. The first of these is clearly an issue of law, hence, it presents no difficulty in the context of a motion for summary judgment. The first issue arises out of Section 16.12 of the agreement entered into between plaintiff MGM and defendant Imperial. This section provides that, "[T]his Agreement shall be governed by the laws of the State of California applicable to contracts made or performed therein." The issue presented by this section is then one of choice of law, and as such clearly an issue of law, thus, the fact that the parties differ as

to its applicability to the case at bar has no bearing on defendants' motion for summary judgment. This issue will be discussed in greater detail, infra.

The second key issue in the instant case is no less controverted by the opposing parties than the first issue. This second key issue can more properly be classified as a number of sub-issues that revolve around a determination of plaintiff MGM's status under the Nevada contractor licensing statutes. The parties are in complete disagreement as to whether the second key issue in the case is more properly classifiable as an issue of fact or an issue of law. By its very nature, if it qualifies as an issue of fact it is clearly a genuine issue of material fact, thus, summary judgment would be improper. If, however, it is more properly classified as an issue

of law, the instant case is ripe for summary judgment.

The main thrust of defendants' motion for summary judgment is based upon the provisions of NRS § 624.320. This section provides that:

"No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed con-

tractor at all times during the performance of such act or contract and when the job was bid." NRS § 624.320.

Defendants allege that at the time plaintiff caused the MGM Grand Hotel to be built in Las Vegas, Nevada, plaintiff was: (1) acting as a contractor, (2) not exempt from the provisions of the Nevada contractor licensing statutes, and (3) required to be licensed as a contractor under the provisions of those statutes. If defendants' allegations are accepted by the Court, they next allege that the provisions of NRS § 624.320, quoted above, foreclose plaintiff from suing upon the alleged breach of contract arising from the construction of the hotel. Plaintiff, of course, contends each of defendants' allegations, and, in addition, alleges that the issue of its status under the Nevada contractor statutes

is a genuine issue of material fact. This does not appear to be the case.

Initially it must be noted that the question of plaintiff's possession, at any time, of a valid Nevada contractor's license is not at issue in the instant case. Defendants have alleged, and plaintiff has admitted, that, at no time relevant to this action, plaintiff possessed a valid Nevada contractor's license. Plaintiff's explanation of this fact is its allegation that it was not required, under Nevada law, to possess such a license.

The statutes regulating and classifying building contractors in Nevada are set forth in Chapter 624 of the Nevada Revised Statutes. In defining the term "contractor" NRS § 624.020(2) notes that:

"Within the meaning of this chapter, a contractor is any person, except a li-

censed architect or a registered professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith.

Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction

project shall be accepted by the board or any court of this state as prima facie evidence that the person securing such permit or employing any person on a construction project is acting in the capacity of a contractor under this chapter." NRS § 624.020(2).

The chapter goes on to note that:

"'Person' as used in this chapter includes an individual, a firm, a copartnership, a corporation, an association or other organization, or any combination of any thereof." NRS § 624.030.

Although the section defining "contractors" appears to be all inclusive, certain persons are exempted from the operation of the chapter, to wit:

"Owners of property building or improving residential structures thereon for the occupancy of such owner and not in-

tended for sale. . . . Owners of property, the primary use of which is as an agricultural or farming enterprise, building or improving structures thereon for the use or occupancy of the owner and not intended for sale or lease."

NRS § 624.330(4), (8).

In further defining the term "contractor" the State Contractors Board has issued regulations classifying types of contractors. For example, under the heading Primary Classification E--Owners--the regulations provide that,

"An Owner's License is designed for persons not regularly engaged in the construction business who need a contractor's license for the purpose of building or improving their own property (other than single family residences occupied by the owner and not intended for

sale). An Owner's License will be issued for a specific property or properties in those classifications for which the owner is deemed qualified."

See Rules and Regulations of the State of Nevada State Contractors Board, Article III, p. 12 (revised July 1973).

If a "person", as defined in NRS § 624.030, acts in the capacity of a contractor, without possessing the required license, or being exempt therefrom, such action is deemed unlawful. See NRS § 624.230. Under the statutes two possible consequences can flow from such unlawful action. Each of the potential consequences is punitive in nature. The first consequence is that,

"No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, en-

gaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid." NRS § 624.320.

The second consequence provides that, "Any person violating any of the provisions of this chapter shall be punished by a fine of not more than \$500."

NRS § 624.360.

[3] The activities, duties, and respon-

sibilities of each party in the instant case pertaining to the construction of plaintiff's hotel are set forth in certain contracts. Neither side of the dispute has alleged that the other has acted in derogation of the contractual provisions. The parties agree that the relationships structured by the contractual provisions existed as defined by the terms of the agreements. Any attempt to show otherwise would, of course, be barred by the operation of the Parol Evidence Rule. The parties' disagreement centers around the effect of the contractual provisions under Nevada law; i.e., the parties agree that plaintiff acted in the capacity of owner as provided for by the contracts; the conflict arises over whether or not plaintiff was required to have a Nevada contractor's license to act in that

fashion. Thus framed, it is clear that the issues of whether plaintiff acted in the capacity of a contractor, or was required to obtain a Nevada contractor's license, or was exempt from such requirement, are issues of law to be resolved by applying the pertinent Nevada Statutes to the facts presented. The facts surrounding plaintiff's activities in constructing its hotel are not disputed, only the legal effect of these activities under Nevada law. This being the case, this Court finds that the instant case presents no genuine issue of material fact, thus it is ripe for summary judgment.

(II) THE CHOICE OF LAW ISSUE:

As noted *supra*, Section 16.12 of the contract entered into between plaintiff MGM and defendant Imperial provides that the agreement shall be governed by California

law. What the Court is presented with then is the situation where the parties, a Nevada corporation and a California co-partnership, have chosen California law to govern a contract to be performed entirely within the State of Nevada. The file in the instant case is silent as to where this particular contract was entered into.

[4,5] As a general rule the parties to a given contract are always free to choose the law that will govern their contractual rights and duties. However, since this is a general rule it is subject to exceptions. The Restatement of the Law 2d notes that:

"The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by

an explicit provision in their agreement directed to that issue, unless either . . .

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement of the Law 2d, Conflict of Laws 2d, § 187(2), (2)(b) (1971).

That which is the "fundamental policy" of a state is not, of course, susceptible to easy definition, rather it must be determined on a case by case basis by examining the law of the state in question. However,

before that question is reached the provisions of § 188 must be applied to determine if Nevada would be the state of the applicable law in the absence of an effective choice of law by the parties. Section six of the Restatement provides general choice of law principles. This section provides in pertinent part that:

". . . the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied."

Restatement of the Law 2d, id. § 6(2).

Section 188 further provides that:

"In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties. . . ."

Restatement of the Law 2d, id. § 188(2).

As noted *supra*, the place of contracting is unknown in the instant case, as is the place of negotiation. However, the place of performance, the location of the subject matter, and the place of incorporation and place of business of one of the parties is found in Nevada. It seems clear then that Nevada has a substantial number of contacts with the contract involved in the instant case. On the other hand, the only California contact that clearly appears is that it is the domicile of one of the parties to the contract. It seems clear then that if the parties in the instant case have not made an effective choice of law, then under the principles

of §§ 6 and 188 of the Restatement, Nevada law should be applied to test their rights and liabilities under the contract.

The final analysis of the parties' choice of law depends on § 187. If the parties have made an effective choice then California law must be applied. However, if California law is contrary to a fundamental policy of the law of Nevada, when it appears that Nevada has a materially greater interest in the contract in question than California, then Nevada law must be applied. Thus, an examination of the laws of the two states is necessary. It is clear from this examination that the laws are contrary. Chapter nine of the California Business and Professions Code is similar in scope and effect to Chapter 624 of the Nevada Revised Statutes. Both chapters provide for the regulation and

licensing of contractors. The major difference in the California Code that specifically pertains to the case at bar is found in § 7044. This section provides that:

"This chapter does not apply to an owner of property building or improving structures thereon, or appurtenances thereto, who contracts for such a project with a contractor or contractors licensed pursuant to this chapter."

Cal.Bus. and Prof.Code § 7044 (1973). It is undisputed in the instant case that Taylor Construction Company, who acted as managing contractor for plaintiff in the construction of plaintiff's hotel, was at all pertinent times a licensed contractor so, arguably, if California law were applied to the instant contract plaintiff would be exempt from the contractor li-

censing requirements. As noted *supra*, such is not the case under Nevada law. Even though an owner contracts with a licensed contractor he is also required to be licensed as a contractor unless exempt from the provisions of Chapter 624. The question still remains as to whether or not this statutory difference represents a fundamental policy of Nevada law.

[6] Since jurisdiction in the instant case is based on diversity of citizenship, this Court is, in effect, sitting as a Nevada court and in doing so it must apply the law as it believes its Nevada counterpart would. It is clear from an examination of NRS Chapter 624 that its provisions delineating the consequences that result when an unlicensed, non-exempt person acts as a contractor are designed to be punitive in nature. The de-

terrent effect of not allowing such an unlicensed person to sue on his contract entered into in derogation of the statute is obvious. It is equally obvious that in passing these statutes the Nevada Legislature desired to protect the public at large, including specialized segments of the public such as materialmen and subcontractors, from the pitfalls that might be encountered in dealing with unlicensed contractors. Even though it can be inferred that one of the prime motives behind the licensing statutes was to insure that those who act in the capacity of contractors be financially stable, and there is no allegation in the instant case that plaintiff was not, the statutory command is clear. If one acts in the capacity of a contractor without a license he is subject to the penalties provided for

by the chapter. It is clear then that the punitive provisions of Chapter 624 express a strong public policy of the State of Nevada. This legislative desire to punish those who ignore the statutory command can even be termed a fundamental policy. To allow parties who enter into a contract to evade these statutory provisions by providing that the laws of a state with a lesser degree of interest shall control their contractual relations is clearly in opposition to this fundamental policy, particularly when the subject matter and performance of the contract are to remain entirely within this state. While sitting, in effect, as a Nevada court, this Court cannot allow the fundamental policy behind the Nevada statutes to be circumvented in this fashion. Even though the parties in the instant case have specified

that California law is to govern their contractual relations, this Court finds that to do so, in the area of the contractor licensing provisions, would be to circumvent a fundamental policy of Nevada, hence Nevada law must be applied to determine if the plaintiff was required to secure a contractor's license and, if so, the effect of its failure to do so.

(III) THE APPLICATION OF NEVADA LAW TO THE FACTS OF THE INSTANT CASE: As noted supra, plaintiff has admitted that at no time relevant to the case at bar did it possess a valid Nevada contractor's license. Therefore, in applying Nevada law to the case at bar, four questions must be answered: (1) was plaintiff acting as a contractor, (2) was plaintiff required to possess a valid Nevada contractor's license in order to construct its

hotel, (3) was plaintiff exempt from the provisions of the licensing statutes, and (4) if plaintiff was required to possess such a license, what is the effect of its failure to do so?

In order to determine if plaintiff was acting as a contractor within the scope of NRS Chapter 624 it is necessary to examine certain of the contractual agreements plaintiff entered into in order to facilitate the construction of its \$100,000,000. hotel and casino complex. Normally, when an owner desires to construct a facility such as plaintiff's hotel he will hire a general contractor who will in turn contract with various sub-contractors. The general contractor normally takes all financial responsibility for the entire project. Even though the owner is the one ultimately paying all

costs, the general contractor is the one looked to by the materialmen, suppliers, sub-contractors, etc., for payment.

Plaintiff in the instant case elected not to follow this established procedure in the construction of its hotel. Instead, plaintiff chose to utilize what is commonly referred to as the managing contractor concept. Pursuant to this plan plaintiff hired cross-defendant Taylor Construction Company to be the managing contractor of the project. A copy of the agreement between plaintiff and Taylor has been made a part of the record in the instant case, as has a copy of the agreement between plaintiff and defendant Imperial.

An examination of the MGM/Taylor contract discloses the following information:

(1) Taylor was employed by plaintiff,

". . . in a consulting and supervisory capacity to supervise and administer the construction of the project." See MGM/Taylor contract, p. 1. (2) Taylor was to be paid a flat fee for these services.

Id. § 2.01. (3) All sub-contracts, etc., were to be made on plaintiff's behalf and plaintiff, but not Taylor, would be responsible for payment thereof. Id. § 2.03.

(4) The agreement created no contractual obligations between Taylor and the various sub-contractors unless Taylor specifically assumed the obligation in writing.

Id. § 15.02.

Likewise, an examination of the MGM/Imperial contract sheds some light on plaintiff's role in the construction of its hotel. The following information is disclosed: (1) Even though Taylor's name appears on the contract it is clear that

Taylor entered into the contract for the benefit of plaintiff. See MGM/Imperial contract p. 1. See also p. 32 where the contract was signed by Taylor as plaintiff's representative, and also by plaintiff's chairman of the board. (2) Plaintiff agreed to pay Imperial for its services on the project. Id. § 1.02. (3) Even though Taylor had the authority to supervise Imperial's work, plaintiff maintained the ultimate control. Id §§ 5.04, 5.08, 8.01, 10.01, 10.02, 13.01.4. (4) The agreement created no contractual relationship between Taylor and Imperial. In addition, plaintiff, and not Taylor, was financially liable to Imperial. Id. § 16.02.

[7] The aforementioned contracts clearly indicate that plaintiff maintained the ultimate financial responsibility and con-

trol over the project. Additional evidence supports this conclusion. The deposition of plaintiff's chairman of the board, Mr. Fred Benninger, indicates that he participated in the negotiation, and made the final approval of the contracts entered into with the various sub-contractors on the project. See defendants' exhibit 1, pp. 16-17, attached to their motion for summary judgment. It is clear from the facts presented that plaintiff fits the description of a "contractor" as provided for by NRS § 624.020(2) noted supra, since it appears that plaintiff undertook through others (i.e., Taylor) to construct its hotel. In addition the file in the instant case contains prima facie evidence that plaintiff was acting as a contractor. In pertinent part NRS § 624.020(2) provides that:

"Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project shall be accepted by the board or any court of this state as prima facie evidence that the person securing such permit or employing any person on a construction project is acting in the capacity of a contractor under this chapter." NRS § 624.020(2).

In addition to the fact that plaintiff employed Taylor and various sub-contractors on the construction project, defendants' exhibit 3 attached to their motion for summary judgment reveals that plaintiff's chairman of the board signed an application for a Clark County, Nevada, building permit for one phase of the construction of plaintiff's hotel. In addition, § 9.03 of the MGM/Imperial contract provided that

plaintiff was to secure the general building permit for the project. Thus, the answer to the Court's first question is clear. Under Nevada law plaintiff was acting as a contractor in the construction of its hotel.

The Court's second and third questions can be answered together. Respectively these questions ask if plaintiff was required to secure a Nevada contractor's license, or was exempt from the statutory provisions. Before examining the statutory provisions of NRS Chapter 624 it is necessary to discuss plaintiff's allegation that the Nevada State Contractors Board has made a determination that plaintiff is not required to possess a contractor's license. The board's initial involvement into this situation appears to have occurred in October of 1972, at which

time the board notified plaintiff that it would be necessary for it to procure a contractor's license in order to continue with the construction of its hotel. See defendants' exhibit 3 attached to their reply points and authorities in support of the motion for summary judgment. It appears that plaintiff ignored this notice from the board and proceeded to continue with the construction of its hotel. On April 25, 1974, long after the hotel had been completed, the question of plaintiff's license again came before the board. The April 25, 1974, hearing was conducted by the board to determine if Taylor Construction Company should be disciplined for certain ~~alleged~~ violations of NRS Chapter 624. One of the alleged violations pertained to the aiding and abetting of unlicensed contractors, spe-

cifically plaintiff. Defendants in the instant case were not represented at this hearing. During the course of the hearing the managing contractor concept was discussed in an attempt to determine whether plaintiff or Taylor was acting as the general contractor on the project. While the question of whether or not plaintiff was required to have a contractor's license was never directly discussed at the hearing, one of the board members made the comment that he thought that Taylor was the general contractor on the project. See defendants' exhibit 2 attached to their reply points and authorities in support of the motion for summary judgment. When the board's ruling concerning Taylor's possible violations of NRS Chapter 624 was handed down no mention was made of plaintiff's status with respect to a contrac-

tor's license. See defendants' exhibit 6 attached to their reply points and authorities. Since it does not appear from the board's findings that Taylor was penalized for aiding and abetting an unlicensed contractor (i.e., plaintiff) it can be inferred that the board felt that plaintiff was not required to possess such a license. However, the record is far from clear on this point.

[8] Even if it can be inferred that the Nevada State Contractors Board has made a finding that plaintiff was not required to possess a contractor's license in order to construct its hotel, this Court is not bound by that determination for several reasons. First of all, while NRS § 624.110 gives the board the authority to make rules and regulations necessary to carry out the provisions of Chapter 624, there

has been no showing that the board has complied with the provisions of that section or the mandate of NRS Chapter 233B, The Nevada Administrative Procedure Act, relating to the adoption of administrative regulations, by passing a regulation exempting those in plaintiff's position from the licensing requirements of NRS Chapter 624. In addition, even if the board had made such a regulation, it would appear that in doing so they would be acting in derogation of the statutory command of NRS Chapter 624. The language of NRS Chapter 624 is clear and unambiguous.

The chapter contains no exception for one in plaintiff's position.

"Administrative construction will not be permitted to override the plain language of the law, and where a statute is not ambiguous and its construction

is not doubtful, the rule that courts will give weight to an administrative construction in determining the true meaning of a statute is not applicable." See 2 Am Jur 2d, Administrative Law § 248 p. 77 and cases cited therein. The record is unclear, at best, as to whether or not the Nevada State Contractors Board has attempted formal recognition of the managing contractor concept by providing that an owner who contracts with a licensed contractor (although not one in the position of a general contractor) is exempt from the licensing provisions of NRS Chapter 624. However, if the board has attempted such a recognition it would appear that they are acting in excess of their statutory authority. To provide such an exemption by recognizing the managing contractor concept calls for

legislative rather than administrative action. Since the Nevada Legislature has not chosen to take this step, the existing statutes must be examined to determine if plaintiff falls within their scope.

[9] This Court has already determined that due to its activities in connection with the construction of its hotel, plaintiff was acting as a contractor. Since it was acting as a contractor, under the Nevada statutes plaintiff was required to possess a Nevada contractor's license (specifically a primary classification "E" license. See Rules and Regulations of the State of Nevada State Contractors Board, Article III p. 12 [revised July 1973], noted *supra*), in order to construct its hotel unless exempted from this requirement by the provisions of NRS § 624.330. Since plaintiff was not an owner

building on residential, agricultural or farming property, the only possible exemption provisions that could apply to it, the Court's answer to the second and third questions is clear. Since plaintiff was not exempt from the provisions of NRS Chapter 624, it was required to possess a valid Nevada contractor's license.

[10] The fourth and final question that must be answered by the Court is the effect of plaintiff's failure to obtain the required contractor's license on its ability to sue the defendants for breach of contract. By acting as a contractor without possessing the required license, plaintiff has committed an unlawful act. See NRS § 624.230. Further, the unlawful nature of plaintiff's acts has tainted its contract with defendants to the extent that the contract must be considered il-

legal. In addition, NRS § 624.320 provides that:

"No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid."

NRS § 624.320.

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There does not appear to be any Nevada case that directly considers the issue presented to this Court, however, there are a number of cases from Nevada and other jurisdictions that consider closely related issues and can provide this Court with guidance. Although the language of NRS § 624.320 does not specifically forbid one in plaintiff's position from suing for breach of contract, it is clear from an examination of defendants' authorities that such a result would not strain the intent of the statute. As the Nevada Supreme Court has noted:

"Norwood v. Judd may now be considered the leading case on the subject. Decided in 1949, it has been followed or cited with approval in numerous cases from 1954 to 1958. Among these we may note particularly Grant v. Weatherholt,

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123 Cal.App.2d 34, 266 P.2d 185, Wilson v. Stearns, 123 Cal.App.2d 472, 267 P.2d 59, and Kennard v. Rosenberg, 127 Cal.App.2d 340, 273 P.2d 839, as being in point here. In Grant v. Weatherholt [123 Cal.App.2d 34, 266 P.2d 191] the court fully recognized the nullifying effect of the statute. 'Plaintiff's contract with the corporation was void. He could not recover on the contract, nor for breach of it, nor for the value of work done or for moneys expended thereunder.' Magill v. Lewis, 74 Nev. 381, 333 P.2d 717, 719-720 (Nev. 1958). This conclusion is also supported by an examination of additional Nevada cases that have considered the effect of this and similar punitive type statutes. See Milum v. Herz Brothers Water Well Drilling and Supply Company, 74 Nev. 301, 329 P.2d

1068 (1958); Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 440 P.2d 122 (1968); Robken v. May, 84 Nev. 433, 442 P.2d 913 (1968); and Beggs v. Lowe, 516 P.2d 467 (Nev. 1973).

Case law from other jurisdictions also supports the proposition that an unlicensed contractor (who is required to be licensed by the statutory provisions) is barred from suing for compensation for, or breach of, a contract arising out of his unlawful activities. For example, before California amended its statutory provisions to provide that an owner who contracted with a licensed contractor was exempt from the licensing provisions (see Cal.Bus. and Prof.Code § 7044) several California cases reached this result. See Proffitt & Durnell Plumbing, Inc. v. David H. Baer Co. 247 Cal.App.2d 518, 55

Rptr. 764 (1966); Currie v. Stolowitz, 169 Cal.App.2d 810, 338 P.2d 208 (1959); Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 308 P.2d 713 (1957); Pickens v. American Mortgage Exchange, 269 Cal.App. 2d 299, 74 Cal.Rptr. 788 (1969); and Moon v. Goldstein, 69 Cal.App.2d 800, 158 P.2d 1004 (1945). See also Miller v. Superior Court in and for County of Pima, 8 Ariz. App. 420, 446 P.2d 699 (1968); Northen v. Elledge, 72 Ariz. 166, 232 P.2d 111 (1951); Brummel v. Whelpley, 46 Mich.App. 93, 207 N.W.2d 399 (1973); Fleming v. Phelps-Dodge Corporation, 83 N.M. 715, 496 P.2d 1111 (1972); and Eklund v. Elwell, 116 Utah 521, 211 P.2d 849 (1949).

An examination of the aforementioned cases and statutes clearly dictates the result in the instant case. For this Court to hold that the provisions of NRS

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§ 624.320 bar plaintiff's suit against defendants clearly does not result in a strained application of the statutory provisions, indeed, a strained application would result if the Court were to hold otherwise. Having found that the instant case presents no genuine issue of material fact for resolution and that the defendants are entitled to prevail as a matter of law, the defendants' motion for summary judgment is hereby granted. This order constitutes this Court's findings of fact and conclusions of law. Accordingly, let summary judgment be entered dismissing plaintiff's complaint. The issues raised by the counterclaim and third-party complaint remain to be tried.

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APPENDIX

APPENDIX D

Federal Rules of Civil Procedure, Rule 56,
Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for

all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and

opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not

so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable ex-

penses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Nevada Revised Statutes, Section 624.320

No person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this act without alleging and proving that such person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, was a duly licensed

contractor at all times during the performance of such act or contract and when the job was bid. (Emphasis in original.)

APPENDIX

APPENDIX E

California Business and Professions Code

Sec. 7031. Actions by contractor, alleging and proving license. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract, except that such prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

New Mexico Statutes, Annotated

Sec. 67-35-33. Suit by contractor for compensation--Pleading and proof of license.--A. No contractor shall act as agent or bring or maintain any action in any court of the state for the collection of compensation for the performance of any act for which a license is required by the Construction Industries Licensing Act [67-35-1 to 67-35-63] without alleging and proving that such contractor was a duly licensed contractor at the time the alleged cause of action arose.

B. Any contractor operating without a license as required by the Construction Industries Licensing Act shall have no right to file or claim any mechanic's lien as now provided by law.

APPENDIX

APPENDIX F

W. Lynn MAGILL and Paul H. Wright,
Appellants,

v.

Joby LEWIS and Helen Lewis, his wife,
Respondents.

No. 4070.

Supreme Court of Nevada.

Dec. 22, 1958.

Rehearing Denied Jan 13, 1959.

Action to recover balance owing under building contract and damages for alleged fraud. The second Judicial District Court, Washoe County, Dept. No. 3, Gordon W. Rice, J., entered summary judgment for defendants, and plaintiffs appealed. The Supreme Court, Badt, C. J., held that fact that one of two plaintiffs was not licensed as a contractor in Nevada would not preclude recovery for unjust enrichment of defendants as a result of their refusal to pay balance owing under contract.

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Judgment reversed and cause remanded for new trial.

Sidney W. Robinson, Reno, for appellants.

Vargas, Dillon & Bartlett, Reno, for respondents.

BADT, Chief Justice.

Appellant Magill, a licensed contractor in the State of Nevada, and appellant Wright, a licensed contractor in the State of California, entered into a contract with respondents for the construction of a casino, bar and restaurant building at Lake Tahoe in the Sierra Nevada mountains, within the State of Nevada, but fairly close to the California line, for the sum of approximately \$130,000. The first cause of action in the complaint in the court below was for the balance of some \$12,000 due on the contract. The second cause of action is based on fraud. It alleges that re-

spondent Lewis, prior to March 29, 1955, desired the construction of the building so as to be ready for occupancy for the summer season of 1955 at the Lake, and on said date conferred with both plaintiffs and insistently requested such construction; that plaintiffs advised Lewis that Wright was not a licensed contractor under the laws of Nevada but was licensed in California and that Wright was prohibited by Nevada statutes from engaging in the contracting business in Nevada and that he could therefore not undertake the contract; that Lewis thereupon falsely and fraudulently and with intention to deceive and defraud the plaintiffs represented that Wright's failure to possess a Nevada contractor's license was immaterial to him as he was relying upon Wright's experience, skill, ability and qualifications rather

than upon the guarantee thereof implied from the holding of a Nevada license; that he, Lewis, would not employ the lack of such license adversely to the plaintiffs; that he was satisfied so long as Magill had a Nevada license and that he would consider Magill's license as inuring to the benefit of the partnership or joint adventure; that said representations were false and known to Lewis to be false and that Lewis intended to use Wright's lack of a Nevada license as an excuse for refusing to pay in full on the contract; that plaintiffs, believing and relying on these representations, were induced to enter into the agreement to furnish the labor and materials for the structure for the sum of \$130,000, to the end that Lewis was enabled to open for business June 17, 1955, and the building completed August 25, 1955;

that Lewis failed to pay the balance due in the sum of \$12,735; that plaintiffs in due course filed their lien and their suit to foreclose the same and that defendants answered, setting up Wright's lack of a Nevada license and moved for summary judgment; that such plea of the statute, if successful, would result in damage to plaintiffs in the sum of \$12,735 by reason of the false and fraudulent representations alleged, all of which were set forth in an amended and supplemental complaint.

NRS § 624.230 provides that it shall be unlawful for any person, association etc., or any combination of any thereof, to engage in the business or act in the capacity of a contractor within the state or to bid a job situated within the state without having a contractor's license. The sections immediately following provide for

the applications for license, examinations thereon, the showing that must be made by the applicant as to experience, financial responsibility, knowledge of building laws, etc., and proceedings for suspension or revocation of licenses, hearings thereon, etc.

NRS § 624.320 reads as follows: "No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed

contractor at all times during the performance of such act or contract and when the job was bid." NRS § 624.360 makes any violation of the chapter a misdemeanor, punishable by a minimum fine of \$50. On the basis of § 624.320 the trial court entered summary judgment for respondents.

[1] Appellants first contend that the entry of a summary judgment under Rule 56, N.R.C.P. is precluded if there is any factual determination remaining for the court or jury. *Parman v. Petricciani*, 70 Nev. 427, 272 P.2d 492. This is conceded.

(1) They next contend that the second cause of action pleaded in the amended and supplemental complaint alleges fraud and sets up the factual issue for determination by court or jury as to whether the defendants, through the perpetration of such fraud, have attempted unjustly to enrich

themselves; and that if the fraudulent actions of the defendants as pleaded can be proved by the plaintiffs, they are entitled to judgment despite the bar of the licensing statute precluding a recovery of compensation under the contract.

Respondents insist that if the statute can thus be circumvented by allegations such as those made by plaintiffs, then all such statutes can be rendered meaningless and their primary purpose defeated.

[2] We start with the proposition that plaintiffs' second cause of action is not an action on the contract itself or for compensation for its performance, but one to prevent the defendants' unjust enrichment of themselves accomplished by means of the fraud practiced by them upon the plaintiffs.

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[3] Various means and remedies have been employed to afford relief outside of the domains of technical contracts and torts. Unjust enrichment, restitution, quasi contract, implied contract, resulting and constructive trusts, accounting, etc. are some of the means thus employed. See 46 Am. Jur. 99-101, Restitution and Unjust Enrichment, for numerous instances and examples. Denning v. Taber, 70 Cal.App.2d 253, 160 P.2d 900 (hearing denied by the Supreme Court), which afforded relief by accounting in the case of a transaction illegal because of failure to secure a bar permit, was referred to as the leading case on the subject in the later case of Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24 (hearing of Supreme Court denied). There, after approving the general rule on which respondent relied (see Hooper v. Barranti,

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81 Cal.App.2d 570, 184 P.2d 688) and after conceding a contrary view expressed in some cases, the court notes numerous cases in which exceptions to the general rule have been recognized. Then, after approving the reasoning in the Denning case as "most convincing", the court says [93 Cal.App. 2d 276, 209 P.2d 31]:

"The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the latin phrase 'in pari delicto' that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The funda-

mental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied. That is the theory of the Denning case, and of the other cases above cited, and we think it is the correct and more enlightened rule."

[4] Norwood v. Judd may now be considered the leading case on the subject. Decided in 1949, it has been followed or cited with approval in numerous cases from 1954 to 1958. Among these we may note particularly

Grant v. Weatherholt, 123 Cal.App.2d 34, 266 P.2d 185, Wilson v. Stearns, 123 Cal. App.2d 472, 267 P.2d 59, and Kennard v. Rosenberg, 127 Cal.App.2d 340, 273 P.2d 839, as being in point here. In Grant v. Weatherholt [123 Cal.App.2d 34, 266 P.2d 191] the court fully recognized the nullifying effect of the statute. "Plaintiff's contract with the corporation was void. He could not recover on the contract nor for breach of it, nor for the value of work done or for moneys expended thereunder." It said further, however: "The courts will not impose penalties for noncompliance in addition to those that are provided expressly or by necessary implication." If in the instant case we should preclude a remedy against defendants' unjust self-enrichment by means of their own fraud, we would be imposing a penalty beyond and in

addition to that provided by the statute. This, under the reasoning and authorities found in Norwood v. Judd, *supra*, with which we are in entire accord, we decline to do. Nor on the other hand are we called on to decide, and we do not decide, that mere allegations of fraud without a showing of a resulting unjust enrichment would invoke the powers of the court to afford relief.

(2) Respondents further contend that the allegations of fraud as made by plaintiffs do not present a case of unjust enrichment, but that such theory is presented for the first time on this appeal. They concede that if the statute as an absolute bar must be sustained as to the \$12,000 balance claimed by plaintiffs, the same situation would exist if respondents had paid no part of the \$130,000 contract and they possessed the entire building without payment

therefor.

[5,6] As to this contention, we are satisfied that under our liberalized rules of pleading these points are not fatal to a recovery. Under Rule 54(c), N.R.C.P.

". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." A satisfying analysis of this rule is found in the discussion by Barron & Holtzoff, § 1194, pp. 35-37: "The second sentence of Rule 54(c) provides that in non-default cases the judgment is not limited in kind or amount by the demand for relief, but may include whatever relief the successful party is entitled to, regardless of the demand. This provision implements the general principle of Rule 15(c), that in a contested case the judgment is to be

based on what has been proved rather than what has been pleaded. It is a necessary rule in a merged system of law and equity; indeed the difficulties which some states have had in implementing the merger of law and equity stems from a failure to grasp and to apply this principle. Any rule other than that stated in the second sentence of Rule 54(c) would mean preservation of the distinctions between law and equity and of the various forms of action which these rules are intended to abolish.

[7] "Thus the rule provides that the demand for judgment loses much of its restrictive force if the case is at issue. Particular legal theories of counsel then are subordinated to the court's right and duty to grant the relief to which the prevailing party is entitled whether demanded or not. If a party has proved a claim for

relief the court will grant him that relief to which he is entitled on the evidence regardless of the designation of the claim or the prayer for relief. The prayer for relief may be of help as indicating the relief to which the plaintiff may be entitled, but it is not controlling, and the question is not whether the plaintiff has asked for the proper remedy but whether he is entitled to any remedy."

The above quotation likewise disposes of the significance attached to plaintiffs' prayer for judgment for the balance due under the contract. Such is not the measure of the relief that may be afforded. We are concerned here, not with the amount due as compensation under the contract, but with the amount by which defendants have been unjustly enriched. But see Restatement of Restitution, § 1(e). In Glen

Falls Indemnity Co. v. Golden, D.C.D.1957, 148 F.Supp. 41, 43, the court was confronted with the same question presented here, namely, whether relief in unjust enrichment would be afforded under a complaint alleging fraud. In answering this question in the affirmative, the federal court stated: "The Federal Rules of Civil Procedure, Rule 54(c), 28 U.S.C.A., have carried this principle [that equity may adjust its relief to the proof] into civil actions generally and expressly provide that a party is not bound by his prayer for relief but may receive such relief as the proof shows him to be entitled to."

Reversed with costs and remanded for new trial.

MERRILL, J., concurs.

McNAMEE, J., having become a member of the court after argument and submission of

the case, did not participate in the foregoing opinion.

NEVADA EQUITIES, INC., a Nevada corporation and the Home Indemnity Company, a corporation, Appellants,

v.

WILLARD PEASE DRILLING COMPANY, a Colorado corporation, qualified to do business in the State of Nevada, Respondent.

No. 5442.

Supreme Court of Nevada.
April 30, 1968.

Action by drilling company for balance allegedly due on well drilling contract. The Eighth Judicial District Court, Clark County, Thomas J. O'Connell, J., entered judgment for drilling company, and defendants appealed. The Supreme Court, Thompson, C. J., held that drilling company which held contractors' license for

oil and gas well drilling and was licensed as water well driller was not barred from bringing suit to recover balance allegedly due on contract to drill well to explore for hot mineral water of artesian nature simply because it did not hold specialty license from State Contractors' Board.

Affirmed.

Wiener, Goldwater & Galatz, J. Charles Thompson, Las Vegas, for appellants.

Morse & Graves, Las Vegas, Dufford, Rulan, Uhrlaub & Williams, Grand Junction, Colo., for respondent.

OPINION

THOMPSON, Chief Justice.

This appeal by Nevada Equities and its ^{1/} indemnitor, The Home Indemnity Company, is from a judgment for \$32,565 in favor

1. Home Indemnity is a party since it gave bond to discharge a mechanic's lien filed by the drilling company against the property of Nevada Equities.

of Willard Pease Drilling Co., which sum was found to be the balance due on a well drilling contract. The main issue is whether the drilling company is precluded from maintaining suit since, according to the appellants, it did not hold necessary licenses.

The object of the well drilling contract was to explore for hot mineral water of an artesian nature. The drilling company was to deepen a 2000 foot hole at the well site to a depth of 6500 feet. Drilling operations were commenced and continued to a depth of 6993 feet, when a "twist-off" occurred halting further drilling. The finding of water was not a condition of payment. Indeed, apart from the licensing issue, it is conceded that substantial evidence otherwise supports the judgment.

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1. Our statutory law governing contractors generally, NRS Chap. 624, provides that one acting in the capacity of a contractor may not maintain an action to recover compensation in the courts of Nevada without alleging and proving that he was a duly licensed contractor as required by "this chapter" at all times during the performance of the contract. NRS 624.320 (italics supplied). The State Contractors' Board is designated as the licensing authority.

[1] Willard Pease Drilling Co. held a contractors' license issued by that Board, classification A6, for oil and gas well drilling. In addition, it was licensed as ^{2/} a water well driller under NRS Chap. 534.

2. NRS 534.140(1) provides: "Every well driller, before engaging in the physical drilling of a well in the State of Nevada for development of water, shall annually make application to the state engineer for a license to drill."

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However, it did not secure the specialty contractors' license described in the Rules and Regulations promulgated by the State Contractors' Board, classification C23a,
^{3/} which NRS 534.140(7) seems to require.

Thus, the narrow question presented is whether Willard Pease Drilling Co. is

3. NRS 534.140(7) reads: "Before engaging in the physical drilling of a well in this state for the development of water, every well driller . . . shall obtain a license as a well driller from the state contractors' board."

Classification C23a of the Rules of the Board reads: "A well drilling contractor is a specialty contractor whose principal contracting business is the execution of contracts requiring some practical elementary knowledge of geology, hydrology, the occurrence of water in the ground, water levels in wells, the prevention of surface and subsurface contamination and pollution of the ground-water supply; and the art, ability, experience, knowledge, science, and skill to intelligently bore, drill, excavate, case, cement, clean and repair water-wells; or to do any, or any combination of any, or all such boring, drilling, excavating, casing, cementing, cleaning and repairing with hand or powered tools or rigs."

barred from bringing suit by reason of NRS 624.320, simply because, although licensed as a water well driller, it did not hold a specialty license (classification C23a) from the State Contractors' Board. We agree with the district court that, in these circumstances, the drilling company is not barred.

[2] Initially, we note that the bar to the maintenance of an action for compensation (NRS 624.320) precludes contractors who are not licensed under that chapter. The claimant was licensed under that chapter. A comparable provision does not appear in Chapter 534 relating to water well drillers. The penalty therein provided is fine, imprisonment, or both. NRS 534.190. When the statute provides for sanctions other than forfeiture of the right to sue on the contract, an unlicensed person is

not precluded from maintaining an action to recover on the contract. Douglas Lumber Co. v. Chicago, 380 Ill. 87, 43 N.E.2d 535 (1942); Moglen v. Gasper, 4 Misc.2d 368, 158 N.R.S.2d 171 (1956); Lusardo v. Harper, Co.Ct., 116 N.Y.S.2d 734 (1950). Cf. Magill v. Lewis, 74 Nev. 381, 333 P.2d 717 (1958), where an unlicensed contractor was allowed recovery on a theory of fraud and unjust enrichment, but not on the contract.

[3] 2. Next, the claimant substantially complied with the licensing scheme under both chapters. It is not suggested that Willard Pease Drilling Co. was wanting in experience, financial responsibility, or indeed, in any particular detrimental to the safety and protection of the public. It had passed the scrutiny of the Contractors' Board in these respects and was issued a license. We shall not condone a

forfeiture in the absence of any ascertainable public policy requiring us to do so. Latipac, Inc. v. Superior Court, 64 Cal.2d 278, 49 Cal.Rptr. 676, 411 P.2d 564 (Cal. 1966).

3. Finally, we mention that the record in this case contains nothing to indicate that the techniques of drilling for water differ substantially from those employed in drilling for oil and gas. No contention is made that because the drilling company was licensed to drill for oil and gas the techniques utilized were incompetent to drill for water. The lower court found that the drilling company had performed in acceptable fashion, and that finding is not challenged.

We deem other assigned errors to be equally without merit.

Affirmed.

COLLINS, ZENOFF, BATJER and MOWBRAY,
JJ., concur.